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11 UNITED STATES DISTRICT COURT  
12 WESTERN DISTRICT OF WASHINGTON  
13 AT TACOMA

14 DAVID P VANDAMENT,

15 Plaintiff,

16 v.

17 COMMANDER MARK DUNCAN *et al.*,

18 Defendants.

Case No. C08-5522RJB/JKA

REPORT AND  
RECOMMENDATION

**NOTED FOR:**

**October 10, 2008**

21  
22 This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28  
23 U.S.C. § 636(b)(1)(B). Plaintiff has been granted *in forma pauperis* status. The court recommends this  
24 action be dismissed, prior to service. The facts and causes of action plaintiff is attempting to pursue call  
25 into question the validity of his guilty plea and conviction.

26 Plaintiff names as defendants in this action Commander Mark Duncan of the Port Orchard Police,  
27 Detective E. Jerry Martin, Prosecutor Robert L Nanon, The City of Port Orchard, and Kitsap County (Dkt.  
28 # 1, proposed complaint).

1 FACTS

2 Plaintiff alleges his constitutional rights were violated on June 2, 2006, When Detective E. Jerry  
3 Martin searched his home and a sailboat boat he owned at a local marina. Plaintiff maintains the searches  
4 occurred without a warrant (Dkt. # 1, proposed complaint, page 3.1). Plaintiff does not allege he objected  
5 to the searches or refused entry to the home or boat. Plaintiff also alleges his constitutional rights were  
6 violated on June 2, 2006, when he was arrested by Detective E. Jerry Martin. Plaintiff maintains he was  
7 arrested without a warrant (Dkt # 1, proposed complaint, page 3.2). Plaintiff also alleges he was held for  
8 more than 48 hours without a “determination of probable cause” on the June 2, 2006, arrest (Dkt # 1,  
9 proposed complaint, page 3.3). Plaintiff was released on fifty thousand dollars bail on June 5, 2006, (Dkt #  
10 1, proposed complaint, page 3.4).

11 On August 22, 2006 Plaintiff’s bail was raised to one hundred and fifty thousand dollars bail.  
12 Plaintiff alleges his rights were violated by this change in bail (Dkt # 1, proposed complaint, page 3.4). In  
13 his complaint, plaintiff neglects to inform the court that when bail was originally set he had not been  
14 charged with a crime. In August a charge of Child Molestation in the First Degree was filed. An arrest  
15 warrant was issued, and plaintiff was again taken into custody (Dkt # 1, proposed complaint, Exhibits 9 to  
16 13). Plaintiff posted the one hundred and fifty thousand dollar bail and was released.

17 Nine days later, after another victim came forward, an amended information was filed. Plaintiff was  
18 charged with one count of Child Molestation in the First Degree and one count of Rape of a Child in the  
19 First Degree. Plaintiff was again taken into custody. This time bail was placed at one million dollars.  
20 Plaintiff did not post bail. Plaintiff contends this arrest was without a warrant and again violated his rights.  
21 Plaintiff again alleges his home was searched in violation of his rights and that the access card to the marina  
22 where his sailboat was moored was also taken.

23 Plaintiff alleges he was again held more then 48 hours without a “probable cause determination”  
24 and this was yet another violation of his rights (Dkt # 1, proposed complaint page 3.6). Plaintiff’s final  
25 claim is that press releases and statements made by Commander Duncan violated his Eighth Amendment  
26 right against cruel and unusual punishment, were slander, denied him equal protection, and were  
27 “prejudicial” (Dkt. # 1, proposed complaint, page 3.7). Plaintiff plead guilty to two felonies. It appears  
28 from the exhibits those felonies were, Molestation of a Child in the First Degree, and Rape of a Child in the

1 First Degree (Dkt # 1, proposed complaint, Exhibits 1 and 20).

2 STANDARD OF REVIEW

3 A complaint is frivolous when it has no arguable basis in law or fact. Franklin v. Murphy, 745 F.2d  
4 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete  
5 defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of  
6 process under 28 U.S.C. § 1915(e)(2)(B). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing*  
7 Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)). A plaintiff must allege a deprivation of a  
8 federally protected right in order to set forth a *prima facie* case under 42 U.S.C. §1983. Baker v.  
9 McCullan, 443 U.S. 137, 140 (1979). In order to state a claim under 42 U.S.C. § 1983, a complaint must  
10 allege that (1) the conduct complained of was committed by a person acting under color of state law and  
11 that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or  
12 laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*,  
13 Daniels v. Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged  
14 wrong only if both of these elements are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir.  
15 1985), *cert. denied*, 478 U.S. 1020 (1986). Section 1915(e) of the PLRA requires a district court to  
16 dismiss an in forma pauperis complaint that fails to state a claim. 28 U.S.C. § 1915; Barren v. Harrington,  
17 152 F.3d 1193, 1194 (9th Cir.1998).

18 Here, plaintiff's application to proceed *in forma pauperis* was approved and his § 1983 complaint  
19 alleges his multiple arrests and searches prior to his conviction were violations of his rights as were many  
20 of the pre trial procedures such as time held in custody prior to appearances, or setting of bail.

21 Plaintiffs' action is a collateral attack to several of the underpinnings for his criminal conviction.  
22 When an incarcerated person is challenging the very fact or duration of his physical imprisonment, and the  
23 relief he seeks will determine that he is or was entitled to immediate release or a speedier release from that  
24 imprisonment, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500  
25 (1973). In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully exhausted  
26 available state remedies **has no cause of action under § 1983 unless and until the conviction or**  
27 **sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus."**  
28 Heck v. Humphrey, 512 U.S. 477, 487 (1994)(emphasis added). The court added:

1 Under our analysis the statute of limitations poses no difficulty while the state challenges are  
2 being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of action for  
3 damages attributable to an unconstitutional conviction or sentence does not accrue until the  
4 conviction or sentence has been invalidated.

5 Id. at 489. “[T]he determination whether a challenge is properly brought under § 1983 must be made based  
6 upon whether ‘the nature of the challenge to the procedures [is] such as necessarily to imply the invalidity of  
7 the judgment.’ *Id.* If the court concludes that the challenge would necessarily imply the invalidity of the  
8 judgment or continuing confinement, then the challenge must be brought as a petition for a writ of habeas  
9 corpus, not under § 1983.” Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir.1997) (*quoting* Edwards v.  
10 Balisok, 520 U.S. 641 (1997)).

11 Here, plaintiff asks the court to find several searches of his home and boat were unconstitutional. He  
12 also asks the court to find the re-setting of bail unconstitutional. He asks the court to find his being held more  
13 than 48 hours before appearing before a judge violated his rights. These issues are part and parcel of the  
14 criminal process that led to his guilty plea and conviction. This action is an improper collateral challenge to  
15 those aspect of the criminal process and a finding in his favor would undermine the propriety of the guilty plea  
16 and convictions.

17 In addition, the prosecutor in this action would be entitled to absolute immunity for his actions. A  
18 prosecuting attorney who initiates and prosecutes a criminal action is immune from a civil suit for money  
19 damages under 42 U.S.C. S 1983. Imbler v. Pachtman, 424 U.S. 409, 431 (1976). Absolute immunity  
20 applies only when the challenged activity is intimately associated with the judicial phase of the criminal  
21 process. Id. at 430. Prosecutors are absolutely immune for quasi-judicial activities taken within the scope  
22 of their authority. Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir.1986). Neither a conspiracy nor a  
23 personal interest will pierce a prosecutor's absolute immunity. Id. Prosecutorial immunity extends to the  
24 process of plea bargaining as an integral part of the judicial process. Miller v. Barilla, 549 F.2d 648, 649 n.  
25 3 (9th Cir. 1977).

26 Finally, plaintiff's Eighth Amendment claim against Commander Duncan for speaking to the press  
27 fails as a matter of law. Words alone cannot form the basis of an Eighth Amendment claim. Oltarzewski  
28 v. Ruggiero, 830 F. 2d 136 (9th Cir. 1987).

The court recommends this action be **DISMISSED WITHOUT PREJUDICE** prior to service.  
Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall

1 have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure  
2 to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474  
3 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
4 matter for consideration on **October 10, 2008**, as noted in the caption.

5  
6 DATED this 8 day of September, 2008.

7  
8 /S/ J. Kelley Arnold  
9 J. Kelley Arnold  
10 United States Magistrate Judge  
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